IN THE SUPREME COURT OF MISSOURI

CASE NO. SC84812

STEPHEN PAUL HARPER,
Plaintiff/Appellant,

vs.

DIRECTOR OF REVENUE,
Defendant/Appellee.

APPEAL FROM
CIRCUIT COURT OF JACKSON COUNTY, MISSOURI
AT INDEPENDENCE

Honorable Vernon E. Scoville, III

APPELLANT'S BRIEF

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JURISDICTIONAL STATEMENT

Stephen Harper appeals from an August 3, 2002, Judgment of the Circuit Court of Jackson County, the Honorable Vernon Scoville, III. The circuit court affirmed the Director of Revenue's one-year revocation and ten-year denial of Stephen Harper's driving privileges based on two or more convictions related to driving while intoxicated. R.S.Mo. §302.060(9). The circuit court also found no prejudice or error in revoking Stephen Harper's driving privileges despite the delay between the date of conviction and notice from the Director of Revenue. R.S.Mo.§302.225.

This appeal raises several questions pertaining to construction of state statutes, including the question of whether five separate counts of assault arising out of a single transaction constitute multiple convictions sufficient to warrant accumulation of points for purpose of license suspension and denial of Stephen Harper's driving privileges. This is an

issue of first impression for this Court. Resolution of the issue lies in ascertaining the meaning of "conviction" or "convicted" as applied to § 302.060(9).

The Missouri Constitution vests this Court with the exclusive jurisdiction to decide cases in which a state statute is alleged to directly violate the Constitution, either facially or as applied. *Mo. Const. Art. V, §3; Alumax Foils, Inc. v. City of St. Louis*, 939 S.W.2d 907, 912 (Mo. banc 1997).

STATEMENT OF FACTS

On April 28, 1999, Appellant, Stephen Paul Harper, was operating his vehicle in Jackson County, Missouri, while in a legally intoxicated condition, (L.F. 6-8). Harper overtook and struck the rear end of one vehicle occupied by four persons, causing that vehicle to collide with another vehicle occupied by one person, (L.F. 6-8). As a result of the collision, the five occupants of the two vehicles sustained injuries, (L.F. 6-8). Harper was arrested and charged in the Circuit Court of Jackson County, Missouri, at Independence, in cause No. CR1999-03560, with five counts of assault second degree (L.F. 6-10). On March 13, 2000, Harper pled guilty to each of the five counts (Supp.L.F. 8-9), and judgment was entered remanding him into the custody of the Division of Adult Institutions for Imprisonment for a period of three years on each count; said sentence to run concurrent, (Supp.L.F. 10-11). Harper was subsequently released from incarceration on October 3, 2000 and placed on probation for a term of five years, (L.F. 11-13). At all times

since Harper's release from incarceration, an Ignition Interlock Device has been in place on his vehicle as required by the trial court's order of September 28, 2000 (L.F. 12).

By letter of February 5, 2001, Harper was notified by the Director of Revenue that his driver's license would be revoked for a period of one year, until March 7, 2002, "for an accumulation of traffic convictions," (L.F. 19). On that same day, the Director notified Harper that his driving privileges would be "denied for 10 years for being convicted more than twice of offenses related to driving while intoxicated," (L.F. 20).

Harper filed a petition with the Circuit Court of Jackson County seeking judicial review of the Director's decision to revoke his driving privileges within thirty days as provided in the February 5, 2001, Loss of Driving Privilege Notice. On April 23, 2002, Harper amended his petition to include a review of the Director's ten-year denial of his driving privileges, (L.F. 14-17). Harper alleged that the one-year revocation was invalid because the circuit court failed to notify the Director of Revenue of the offense within ten days of the conviction, and a year had passed between the time of his conviction and the February 5, 2001 notice of revocation, (L.F. 15). Harper further alleged that his only conviction arose out of the April 28, 1999 accident and that he has no prior or subsequent convictions, (L.F. 16-17). The Amended Petition alleged that convictions arising out of a single transaction, occurrence or event do not constitute multiple convictions requiring revocation, (L.F. 16). Harper asked the court to restrain the Director from further attempts to revoke his driving privileges and to reinstate his Missouri drivers' license, (L.F. 17).

The Director of Revenue answered (L.F. 1-3), and attached nine pages of records from the Drivers License Bureau, (L.F. 5-13). The records submitted consisted of the February 5, 2001 letter informing Harper of the one-year revocation (L.F. 5), a copy of the Complaint containing five counts of assault (L.F. 6-10), and an Order of release and probation, (L.F. 11-13).

On July 25, 2002, Associate Circuit Judge Vernon E. Scoville, III, affirmed the Director's one-year revocation and ten-year denial of Harper's driving privileges, (L.F. 24). Judge Scoville found that the one-year revocation was proper and Harper "suffered no prejudice or irreparable harm resulting from the delay in revoking" his driving privileges, (L.F. 23). Judge Scoville further found that the ten-year denial was valid because "conviction of five separate counts arising out of the single incident of April 28, 1999, constitute multiple convictions for purpose of license suspension, " (L.F. 24).

Harper filed a Motion to Reconsider and Amend Order, or in the Alternative for a New Trial on August 5, 2002, (L.F. 25-27). The Motion to Reconsider was denied by Judge Scoville on August 13, 2002, (L.F. 28), and this appeal was filed on August 29, 2002, (Supp.L.F. 1-7).

Because the Order of July 25, 2002, did not contain the word "judgment," Harper filed a Motion to Correct Clerical Mistake in Order and Suggestions in Support on October 3, 2002, (L.F. 29-30). The motion sought only to include the word "judgment" so as to accurately reflect that the decision rendered on July 25, 2002, was a final appealable order, (L.F. 29). The motion was granted and an Order Nunc Pro Tunc entered by Judge Scoville

on October 3, 2002, (L.F. 31) changing the title of the July 25, 2002 "Order" to a "Judgment Order," (L.F. 32-33).

POINTS RELIED ON

I. THE TRIAL COURT ERRED IN AFFIRMING THE DIRECTOR OF REVENUE'S TEN-YEAR DENIAL OF STEPHEN HARPER'S DRIVING PRIVILEGES BECAUSE HE HAS NOT BEEN CONVICTED MORE THAN TWICE OF OFFENSES RELATED TO DRIVING WHILE INTOXICATED AS REQUIRED BY R.S.MO. § 302.060(9). THE PROSECUTING ATTORNEY FILED ONE COMPLAINT CONSISTING OF FIVE COUNTS UPON WHICH APPELLANT WAS CONVICTED, BUT THERE WAS ONLY ONE FINAL JUDGMENT OF CONVICTION RENDERED BY THE CIRCUIT COURT JUDGE UPON WHICH THE DIRECTOR OF REVENUE CAN ASSESS POINTS OR IMPOSE A SUSPENSION OR REVOCATION OF DRIVING PRIVILEGES.

Clare v. Director of Revenue, 64 S.W.3d 877 (Mo.App. E.D. 2002)

Collins v. Director of Revenue, 691 S.W.2d 246 (Mo.banc. 1989)

State v. Byerly, 522 S.W.2d 18, 20-21 (Mo.App. 1975)

State v. Mayo, 915 S.W.2d 758, 762-763, (Mo. 1996)

R.S.Mo. §302.010

R.S.Mo. §302.060(9)

R.S.Mo. §511.020

Mo. R. Civ. P. 74.01

Mo. R. Crim. P. 23.05

II. THE TRIAL COURT ERRED IN AUTHORIZING RESPONDENT,

DIRECTOR OF REVENUE, TO DENY APPLICANT'S DRIVING PRIVILEGES FOR TEN YEARS IN ACCORDANCE WITH R.S.MO. §302.060 BECAUSE APPLICATION OF THE DIRECTOR'S INTERPRETATION OF THE TERM "CONVICTION" SUBJECTED APPELLANT TO THE HARSHEST OF SANCTIONS BASED SOLELY ON THE HAPPENSTANCE OF HOW MANY COUNTS THE PROSECUTOR ELECTED TO CHARGE IN THE COMPLAINT. APPLICATION OF THE STATUTE IN THIS MANNER VIOLATES APPELLANT'S RIGHTS UNDER THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION IN THAT IT DISCRIMINATES AGAINST ONE PERSON IN FAVOR OF ANOTHER OR CLASS OF PERSONS, WITH NO RATIONAL BASIS FOR ANY DIFFERENTIATION IN TREATMENT.

Brown v. Director of Revenue, 772 S.W.2d 398, 401 (Mo.App. W.D. 1989)

Clare v. Director of Revenue, 64 S.W.3d 877 (Mo.App. E.D. 2002)

State v. Mayo, 915 S.W.2d 758, 762-763, (Mo. 1996)

State v. Baker, 524 S.W.2d 122, 129-131 (Mo. 1975)

R.S.Mo. §302.060(9)

R.S.Mo. §302.060(10)

III. THE TRIAL COURT ERRED IN FINDING THAT THE ONE-YEAR REVOCATION OF APPLICANT'S LICENSE WAS PROPER AND TIMELY BECAUSE R.S.MO. §302.225(2) REQUIRES THAT UPON CONVICTION OF AN

OFFENSE MANDATING SUSPENSION OR REVOCATION OF A PERSON'S DRIVING PRIVILEGES, THE CIRCUIT COURT IS TO NOTIFY THE DIRECTOR OF REVENUE OF THE OFFENSE WITHIN TEN DAYS BY FORWARDING A COPY OF THE RECORD TO THE DIRECTOR. IN THIS CASE, THE CLERK SENT NO NOTICE TO THE DIRECTOR OF REVENUE AND NO REVOCATION ENSUED UNTIL A PERIOD OF ONE YEAR PASSED FROM THE TIME OF APPLICANT'S CONVICTION.

Brown v. Director of Revenue, 772 S.W.2d 398, 401 (Mo.App. W.D. 1989)

Buttrick v. Director of Revenue, 804 S.W.2d 19, 20 (Mo. banc. 1991)

State ex rel. McTague v. McClellan, 532 S.W.2d 870, 871 (Mo. banc 1976)

Yelton v. Becker, 248 S.W.2d 86, 89 (Mo.App. 1952)

R.S.Mo. §302.225(2)

Black's Law Dictionary (Pocket ed., West, 1996)

ARGUMENT

I. THE TRIAL COURT ERRED IN AFFIRMING THE DIRECTOR OF REVENUE'S TEN-YEAR DENIAL OF STEPHEN HARPER'S DRIVING PRIVILEGES BECAUSE HE HAS NOT BEEN CONVICTED MORE THAN TWICE OF OFFENSES RELATED TO DRIVING WHILE INTOXICATED AS REQUIRED BY R.S.MO. § 302.060(9). THE PROSECUTING ATTORNEY FILED ONE COMPLAINT CONSISTING OF FIVE COUNTS UPON WHICH APPELLANT WAS CONVICTED, BUT THERE WAS ONLY ONE FINAL JUDGMENT OF CONVICTION RENDERED BY THE CIRCUIT COURT JUDGE UPON WHICH THE DIRECTOR OF REVENUE CAN ASSESS POINTS OR IMPOSE A SUSPENSION OR REVOCATION OF DRIVING PRIVILEGES.

Review of the circuit court's decision in this case is controlled by *Murphy v. Carron*, 536 S.W.2d 30 (Mo. banc 1976), and must be affirmed unless it is not supported by substantial evidence, is against the weight of the evidence, or it erroneously declares or applies the law, *Id.*, at 32.

The issue in this case is fundamentally of law – how do various statutes affect the driving privileges of Appellant, and what legislative intent can be inferred from the wording of the statutes? Specifically, the question is whether or not a single case with several counts contained therein, all arising out of the same incident or occurrence, constitute a single conviction or multiple convictions within the purview of R.S.Mo. §302.060(9). Appellant is not asking the court to make a legislative decision, but a judicial one – namely

to exercise its power to review construction placed on a statute by earlier court decisions and by arms of the executive branch -- in order to correct erroneous construction of §302.060(9) and prevent a manifest injustice and inequality of treatment.

It is fundamental to the structure of our government that administrative agencies only have the authority conferred upon them by statute, *State v. Missouri Health Facilities Rev. Com.* 768 S.W.2d 559 (Mo.App. W.D. 1988). Since an agency only has the authority conferred upon it by the legislature, it cannot adopt a rule or interpret a statute in such a way that the intent of the legislature is nullified, *State v. Public Service Commission*, 225 S.W.2d 792 (Mo.App. W.D. 1949). An administrative construction of a statute cannot make a clear, unambiguous statute ambiguous by giving it a meaning different from that expressed in the authorizing statute, *Blue Springs Bowl v. Spradling*, 551 S.W.2d 596 (Mo.banc. 1977). It is apparent in the present situation that the Director of Revenue has adopted an interpretation of §302.060(9) which is unwarranted both if the statute is viewed as ambiguous or is viewed as plainly setting out the authority of the Director of Revenue.

Where the decision of an administrative agency is based upon an interpretation of a law or application of law to the facts, the courts are not precluded from independently reviewing the agency decision, *Al-Tom Inv., Inc. v. Director of Revenue*, 774 S.W.2d 131,132 (Mo.banc. 1989). Although some weight should be given a construction placed on a statute by the agency charged with administering the statute, the courts are not bound by the administrative construction, *Spudich v. Director of Revenue*, 745 S.W.2d 677 (Mo.banc. 1988); *Hudson v. State Security Ins. Co.*, 555 S.W.2d 859 (Mo.App. E.D. 1977).

The cardinal rule of statutory construction requires the court to ascertain the true intention of the legislature, giving reasonable interpretation in light of legislative objective, *Collins v. Director of Revenue*, 691 S.W.2d 246, 251 (Mo. 1985); citing *BCI Corporation v. Charlebois Construction Co.*, 673 S.W.2d 774, 780 (Mo. banc 1984). In determining the legislature's intention, the provisions of the entire legislative act must be construed together, *in pari materia*, and if reasonably possible, all the provisions must be harmonized, *Id.*; citing *Bartley v. Special School District of St. Louis County*, 649 S.W.2d 864, 867 (Mo. banc 1983).

"*In pari materia*" means "upon the same matter or subject," Black's Law Dictionary 318 (West, Pocket Ed., 1996). The doctrine requires that statutes relating to the same subject matter be construed together even though the statutes are found in different chapters and were enacted at different times, *State ex rel. Director of Revenue, State of Mo. v. Gaertner*, 32 S.W.3d 564, 566, (Mo. 2000). However, "[w]here one statute deals with a subject in general terms and another deals with the same subject in a more minute way, the two should be harmonized if possible, but to the extent of any repugnancy between them the definite prevails over the general," *Id.* When necessary the strict letter of the statute must bend to the general spirit of the law in order to avoid absurd or unreasonable results, *BCI Corp., supra.*. The law favors constructions that avoid creation of unreasonable results and inequities, *Collins, supra.*, citing *State ex rel. McNary v. Hais*, 670 S.W.2d 494, 495 (Mo. banc 1984); *Maryland Casualty Co. v. General Electric Co.*, 418 S.W.2d 115, 118 (Mo. banc 1967).

An analysis of the challenged statutory section, 302.060(9), demonstrates that it can be harmonized with the rest of the act if interpreted in accordance with the statutory definition of "conviction" as set forth in §302.010, *Collins, supra.* The stated purpose of Chapter 302 is to protect the safety and welfare of the public by expeditiously removing the most dangerous drunk drivers from Missouri roadways, *Id.* Arguably, the public is best served by removing alcohol related offenders regardless of the number of convictions, number of persons injured, or making any distinction between single or multiple offenses. However, that is clearly not what the legislature intended. Reading all of the statutory provisions in Chapter 302, including the point system, it is clear that the legislature intended to give offending drivers more than one chance by punishing more severely for any subsequent offenses.

"The operation of a motor vehicle while under the influence of intoxicants gives rise to two separate and distinct proceedings--one civil and the other criminal or quasi-criminal," *State v. Byerly*, 522 S.W.2d 18, 20-21 (Mo.App. 1975). This Court noted the dual nature of the proceedings in two cases challenging the constitutionality of earlier versions of the license revocation statutes, *State v. Mayo*, 915 S.W.2d 758, 762-763 (Mo. 1996), citing *Vetter v. King*, 691 S.W.2d 255 (Mo. banc 1985), *Collins, supra.* In each of the cases, this Court held that the dual proceedings, criminal and civil, are "independent of the other" and "the outcome of one action is of no consequence to the other," *Id.*, (emphasis added).

If license revocation is held to be a criminal proceeding, the questions and problems

of dealing with the issue of double jeopardy come in to play. To overcome this issue, courts throughout the country, including Missouri, affirm that the "purpose of the statutes authorizing revocation of a driver's license for alcohol related offenses is to protect the public, not to punish the licensee," *Id.* "The purpose of an enactment such as §302.060 to deny or delimit driver licensure to persons underage, addicts, drunkards and **recurrent intoxicated violators**, is not to punish a licensee, but to protect the public," *White v. King*, 700 S.W.2d 152 (Mo.App. W.D. 1985) (emphasis added). This stated remedial purpose removes the statutes from the criminal arena, and places them in the realm of civil procedure. "The statutes are not criminal statutes but rather remedial statutes which should be enforced as they are written," *Messer v. King*, 698 S.W.2d 324, 325 (Mo. 1985). Because license suspension and revocation are held to be civil proceedings serving a remedial purpose instead of administering punishment, criminal proceedings based on the same events do not constitute double jeopardy, *Mayo, supra.* The one limitation is that while there is a remedial purpose served by removing from the roadways those persons who abuse their driving privilege by driving under the influence of alcohol, if the sanction is too far divorced from its remedial purpose it could be more fairly characterized as punishment. *Id.*

State v. Byerly, supra., involved a situation where the Defendant's license was revoked for refusing to submit to a breath test despite the fact that the he had been acquitted of the criminal charges. The court held that the "revocation of a license for refusal to submit to a breath test is considered to be an administrative function flowing from the

police power of the state to regulate driving in the interest of public welfare and safety," *Id.,* at 21. The fact that the criminal charge was not proved had no bearing on the civil revocation proceeding based on the refusal to submit to a test of his breath, *Id.* The court conclude that "(1) a charge of driving under the influence of intoxicants is a separate and independent proceeding from an administrative revocation of a driver's license . . .; (2) an acquittal upon a charge of driving under the influence does not preclude an administrative revocation of a driver's license . . .," *Id.*

The argument presented by the Director to the trial court in this case relied on *Clare v. Director of Revenue,* 64 S.W.3d 877 (Mo.App. E.D. 2002), as precedent for holding that multiple convictions arising from the same incident are sufficient to revoke a party's license for ten years. Clare was convicted of four counts of assault in the second degree arising out of a single event, after pleading guilty to the charges, *Id.*, at 878. He was subsequently notified by the Director of Revenue that his driving privileges were denied for ten years for being convicted more than twice for offenses relating to driving while intoxicated, *Id.*, at 878. The circuit court set aside the denial of privileges and ordered Clare's license reinstated after finding that "for purposes of license suspension there was only one conviction arising from the incident of June 25, 1999," *Id.* The Director appealed the judgment and the appellate court, basing their holding on the definition of "conviction" as set out in Black's Law Dictionary, rather than the statutory definition as set forth in R.S.Mo. §302.010, reversed and remanded with instructions, *Id.* The appellate court determined that the "statutory definition [of 'conviction']does not resolve the issue of

whether a person who pleaded guilty to more than two counts of violation of state law relating to driving while intoxicated resulted from one incident is subject to the provisions of section 302.060(9),." *Id.*, at 879.

Appellant in this case contends that a closer reading of the statutory definition of conviction as provided in §302.010, does lend support to the issue of whether the Director's interpretation of §302.060(9) is valid. "The term 'conviction' means the **original judgment of conviction** for the purpose of determining the assessment of points, and the date of **final judgment** affirming the conviction shall be the date determining the beginning of any license suspension or revocation pursuant to section 302.304." R.S.Mo. §302.010 (emphasis added). Both the Director and the appellate court confine their reading of the definition to the term "conviction," and base their interpretation thereon. This results in a circular logic by limiting the definition of "conviction" to the term "conviction." The definition also consists of the terms "original judgment of conviction" and "final judgment" which must be considered as guidance to a correct interpretation of §302.060(9). In that regard, we must first look to the Rules of Civil Procedure since it has been held that license revocation proceedings are civil in nature.

A "**judgment**" is the "final determination of the right of the parties in the action," R.S.Mo. §511.020 (emphasis added). "Judgment" as used in the Rules of Civil Procedure "includes a decree and any order from which an appeal lies." Mo. R. Civ. Pro. 74.01. It is rendered when entered, and is "entered when a writing signed by the judge and denominated 'judgment' or 'decree' is filed." Mo. R. Civ. Pro. 74.01 (emphasis added).

Prior holdings of this Court reveal that "for a judgment to be final it must dispose of all parties and issues in the cause," *Webster v. Sterling Finance Co.*, 165 S.W.2d 688, 690 (Mo. 1942). Furthermore, there "can be but one final judgment," cf. *Barr v. Nafziger Baking Co.*, 41 S.W.2d 559, 328 Mo. 423, 565 (Mo. 1931); *Bruner v. Workman Oil Co.*, 2002 WL 1461095, (Mo.App. S.D. 2002) [where there are multiple counts in a petition, there should be separate findings upon each claim, but one final judgment should be entered]. Although civil claims can consist of multiple claims or parties, the end result is but one final judgment, *Barr, supra.* "Where a petition contains several causes of action stated in as many counts, and there is a verdict of the jury, or a finding of the court sitting as a jury, for the plaintiff, there should be a verdict or finding on each cause of action or count, and these should all be blended in one judgment," R.S.Mo. §511.020, citing *Wells v. Adams*, 88 Mo.App. 215 (emphasis added).

Even granting argument that criminal rules are applicable to license revocation proceedings, the definition of "conviction" as set forth in §302.010 still supports the fact that conviction of multiple counts arising from a single incident are not sufficient to deny Appellant's driving privileges for ten-years. Specifically, the Rules of Criminal Procedure provide that each offense in an information should be charged in separate counts, Mo.R.Crim.P. 23.05. However, an exception to that rule is that separate offenses may be charged in a single count when "component parts of a continuous transaction committed by the same person [occur] so close in time that they [constitute] a single offense," *State v. Villaneueva*, 598 S.W.2d 161, 163 (Mo.App. 1980).

In this case, the State joined several offenses arising out of a single occurrence as authorized by Mo.R.Crim.P. 23.05. However, Missouri courts have indicated that a "criminal judgment is final both for the purposes of exhausting the trial court's judgment and of triggering the defendant's right of appeal when the sentence and judgment finally disposes of all issues in the criminal proceeding, leaves no questions to the future judgment of the court and is neither interlocutory nor conditional in any respect," *State v. Wakefield*, 689 S.W.2d 809, 812 (Mo.App. S.D. 1985), citing *State ex rel. Wagner v. Ruddy,* 582 S.W.2d 692, 694 (Mo. 1979). In fact, the term "sentence" is defined by the courts to mean "judgment or final judgment," and a criminal case is not ripe for appeal if no sentence has been pronounced, *Id.* Similarly, more explicit federal cases hold, without equivocation, "that unless a sentence or other authorized punishment has been imposed upon every count of a multi-count indictment, the criminal judgment is not final and appealable," *Wakefield, supra.*, citing *United States v. Wilson*, 440 F.2d 1103, 1104-1105 [2-4][5] (5th Cir.1971), cert. denied, 404 U.S. 882, 92 S.Ct. 210, 30 L.Ed.2d 163 (1972), and 405 U.S. 1016, 92 S.Ct. 1290, 31 L.Ed.2d 478 (1976); *United States v. Bronson,* 145 F.2d 939, 944[10] (2d Cir.1944).

The prosecutor in this matter could have charged Harper with one count of Assault Second Degree, naming all five victims, or charged in five separate counts as he did (L.F. 6-8). Regardless of whether the complaint consisted of one or five counts, the fact remains that there was but one "judgment" entered by the circuit court judge (Supp.L.F. 10-11). Because the criminal proceedings and civil proceedings are independent of each other, the

fact that there were multiple counts upon which Harper was convicted, under the statutory definition of "conviction," there is only one judgment upon which the Director can rely. Had the prosecuting attorney brought five different causes of actions with five separate case numbers, and had there been five separate judgments entered by the circuit court judge, then there would have been multiple convictions forming the basis for a ten-year revocation of Appellant's driving privileges. Since that is not the case, and there is but one "judgment of conviction" in this case, the ten-year revocation is not valid or authorized under §302.060(9), and should be set aside by this Court.

II. THE TRIAL COURT ERRED IN AUTHORIZING RESPONDENT, DIRECTOR OF REVENUE, TO DENY APPLICANT'S DRIVING PRIVILEGES FOR TEN YEARS IN ACCORDANCE WITH R.S.MO. §302.060 BECAUSE APPLICATION OF THE DIRECTOR'S INTERPRETATION OF THE TERM "CONVICTION" SUBJECTED APPELLANT TO THE HARSHEST OF SANCTIONS BASED SOLELY ON THE HAPPENSTANCE OF HOW MANY COUNTS THE PROSECUTOR ELECTED TO CHARGE IN THE COMPLAINT. APPLICATION OF THE STATUTE IN THIS MANNER VIOLATES APPELLANT'S RIGHTS UNDER THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION IN THAT IT DISCRIMINATES AGAINST ONE PERSON IN FAVOR OF ANOTHER OR CLASS OF PERSONS, WITH NO RATIONAL BASIS FOR ANY DIFFERENTIATION IN TREATMENT.

Section 302.060(9), as applied to Stephen Harper violates his rights under the equal

protection clause of the Fourteenth Amendment of the United States Constitution. In order for the equal protection clause to come into play, there must be some form of state action. The action of a state agency in applying a statute it is charged with administering satisfies this state action requirement, cf. *Armentrout v. Schooler*, 409 S.W.2d 138 (Mo. 1966).

Also, in order for the Fourteenth Amendment equal protection clause to come into play, there must be some classification involved. This classification can either be apparent on the face of a statute, or can become apparent once a statute is applied to a particular situation, *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (emphasis added). In Mr. Harper's case, §302.060(9), as applied by the Director of Revenue, leaves much to prosecutorial whim in terms of drafting the complaint in the criminal proceedings. The Director's interpretation also reveals inequities between the sanctions imposed and the nature of the offense charged.

Driving is not considered a "fundamental right", but only a privilege which is subject to extensive state regulation; thus regulations burdening it are not subject to heightened judicial scrutiny, *Stewart v. Director of Revenue*, 702 S.W.2d 472 (Mo. 1986). Along these same lines offenders are not *per se* considered a "suspect class" which would trigger a strict scrutiny form of review, cf. *State ex rel. Nixon v. Askren*, 27 S.W.3d 834 (W.D. 2000). Since no fundamental right or suspect classification is involved in the present situation the courts apply a "rationality test" for general economic and social legislation. This Court has described the approach as follows: "If the classification neither burdens a suspect class nor impinges upon a fundamental right, it need only be rationally related to a legitimate state

interest, and the person attacking it bears the burden of demonstrating the scheme has no reasonable basis and is purely arbitrary." *State v. Wright*, 751 S.W.2d 48 (Mo. banc 1988) (emphasis added). In the context of driver's licenses, the court in *Brown v. Director of Revenue*, 772 S.W.2d 398, 401 (Mo.App. W.D. 1989) observed that: "An essential element to any equal protection challenge is an alleged discrimination against one person in favor of another person or class of persons, with no rational basis for any differentiation in treatment" (emphasis added). The court went on to quote the following passage from *State v. Day-Brite Lighting, Inc.*, 362 Mo. 299, 240 S.W.2d 886, 893 (1951): "When all persons within the purview of a statute are subjected to like conditions, then they are afforded equal protection of the law" (emphasis added).

The Director can supply no possible rational basis for his wholly disparate treatment of two classes of offenders who commit the same crime. The only difference between the two classes is the manner in which the prosecuting attorney drafts the complaint in the criminal proceedings. This arbitrary distinction between the two classes can have no rational purpose. If, as authorized by the Rules of Criminal Procedure, the prosecuting attorney drafts the complaint in the form of one count containing the names of multiple victims arising out of a single incident, the Director interprets this as one conviction. However, if the prosecutor elects to use separate counts in one complaint for each victim of the offense and there is a conviction on each count, the Director interprets this as multiple convictions and imposes the sanction of a ten-year denial of driving privileges.

Applying the Director's interpretation of §302.060(9) clearly requires different and

unequal treatment for different defendants not based on any legitimate state purpose or interest, *Brown, supra.*. It mandates different treatment of defendants without any reasonable or rational basis for that difference, *Id.* By reading the statute as endorsed by the appellate court in *Clare, supra.,* the increased sanction by means of mandatory denial of driving privileges for ten years is not based on whether the offenses in question were all committed at the same time or whether they were committed at different times. *State v. Baker*, 524 S.W.2d 1222, 129-131. It is not based on how severe the offenses are, or how many judgments are entered by the court. It is based only on whether the defendant was convicted more than twice, which is subject to control by the prosecuting attorney based on the number of victims and the prosecutor's election to bring a single or multi-count complaint. The inequality of treatment resulting from the classification provided by the Director's interpretation is evident from the following examples:

Example 1. Defendant A while operating a motor vehicle in an intoxicated condition is the cause of a motor vehicle accident in which two people are seriously injured. The prosecuting attorney for the county where the accident occurred elects to bring a single count cause of action and obtains a conviction on January 1, 2000. The Director assesses 12 points and Defendant A's driving privileges are revoked for one year, with eligibility for reinstatement of driving privileges on January 1, 2001. Driver A regains his license and on April 4, 2001 is involved in another alcohol related contact, this time resulting in the injury of one person. Charges are filed, a conviction obtained, and Driver A's license is again revoked. Despite two revocations, one year later Defendant A is again

granted driving privileges only to cause yet another motor vehicle accident on November 1, 2002, while driving in an intoxicated condition. This accident results in the injury of five people for which the prosecuting attorney files a five-count complaint, and obtains convictions on each of the five counts. At this point the Director notifies Defendant A that driving privileges will be denied for ten years based on having been convicted more than twice of alcohol related offenses. Defendant A has eight convictions arising out of three separate incidents within a two-year period.

Example 2. Defendant B while operating a motor vehicle in an intoxicated condition is the cause of a motor vehicle accident in which six people are injured. The prosecuting attorney for the county where the accident occurred elects to bring a six count cause of action and obtains a conviction on each of the six counts on January 1, 2002. The Director assesses 12 points on each on the convictions for which Defendant B receives a one-year revocation of driving privileges. In addition, Defendant B's driving privileges are immediately denied for ten years because (s)he has been convicted more than twice of alcohol related offenses and is not eligible for reinstatement until January 1, 2012.

Similar hypothetical examples showing disparity of treatment based on the Director's interpretation of §302.060(9) could be given ad infinitum, *Id.*. In light of the obvious disparity in treatment, the question then becomes whether this section of the statute serves the remedial purpose for which the statute was created or as a punishment. *Mayo,* 915 S.W.2d 762-763. In *Mayo,* this Court found that the sanction was increased because the defendant had been shown by the prior "alcohol related enforcement contact" to

be highly dangerous, and the purpose for increasing the sanction was to ensure greater safety on the highways, *Id.* This raises two questions: First, how can it be said that one involved in single incident is a greater threat to the public safety than a habitual offender.

The second question in this regard is: what rational basis is served by revoking the license of someone convicted of involuntary manslaughter for five years, while revoking the license of someone involved in one single incident resulting in the injury of five people for ten years. R.S.Mo. §302.060(10) provides for a five-year revocation of driving privileges when "convicted twice within five years" for offenses involving driving while intoxicated and involuntary manslaughter. Had Mr. Harper killed someone in the vehicle accident, he would lose his license for five years; but injuring five people results in a ten-year revocation.

Clearly, equal protection does not require that all persons be dealt with identically. *Baker, supra.,* at 129-131. Factual situations can justify a difference, *Id.* "For example, one burglar may be sentenced to four years imprisonment and another may be sentenced to two years or five years," *Id.* However, equal protection does require that distinctions in classifications have some relevance to the purpose for which the classification is made, *Id.* That relevance cannot be found when applicability of the mandatory revocation is based on the number of individuals involved and has no relationship to such things as seriousness of the offense committed, the factual circumstances surrounding the offense, whether the offenses were committed at the same time or at different times, and is dependent solely on the happenstance of how many counts the prosecutor elects to charge in the complaint, *Id.*

A first offender unfortunate enough to collide with a vehicle carrying three or more persons may receive the harshest of sanctions, while the habitual offender injuring one person at a time is given multiple chances prior to receiving the same sanction. Given this distinction, all semblance of rationality of the classification disappears, *Id.*

Appellant does not deny that §302.060 serves the state's legitimate interest in suspending or revoking drivers' licenses "to prevent the slaughter on our highways which might occur if intoxicated persons were permitted to drive," *Collins, supra.*, at 250. His challenge is limited to the Director and appellate court's interpretation of the term "conviction" as applied to §302.060(9), *Clare, supra*. He contends that there is no rational basis for treating drivers disparately based on the number of "victims" rather than the number of "final judgments of conviction." For this reason, the decision of the trial court should be reversed and the case remanded with instructions to remove the ten-year denial of Harper's driving privileges from his record.

III. THE TRIAL COURT ERRED IN FINDING THAT THE ONE-YEAR REVOCATION OF APPLICANT'S LICENSE WAS PROPER AND TIMELY BECAUSE R.S.MO. §302.225(2) REQUIRES THAT UPON CONVICTION OF AN OFFENSE MANDATING SUSPENSION OR REVOCATION OF A PERSON'S DRIVING PRIVILEGES, THE CIRCUIT COURT IS TO NOTIFY THE DIRECTOR OF REVENUE OF THE OFFENSE WITHIN TEN DAYS BY FORWARDING A COPY OF THE RECORD TO THE DIRECTOR. IN THIS CASE, THE CLERK SENT NO NOTICE TO THE DIRECTOR OF REVENUE AND NO REVOCATION ENSUED

UNTIL A PERIOD OF ONE YEAR PASSED FROM THE TIME OF APPLICANT'S CONVICTION.

It is Applicant's position that despite the fact that this issue has previously been addressed by the court, interpretation of the ten-day reporting period of R.S.Mo. §302.225 as directory rather than mandatory contradicts the legislative purpose of the statute. Section 302.225 expressly requires every court to forward a notice of conviction or surrendered license to the department of revenue within ten days, whenever a person is convicted of an offense which makes mandatory the suspension or revocation of the license of such person by the Director of Revenue. In this regard, both subsections of §302.225 specifically provide that the court **"shall"** forward either a notice of conviction or a surrendered license to the director of revenue **within ten days** (emphasis added). However, prior decisions of the Missouri courts have held this statute to be merely directory so that there is no mandatory requirement for the courts to comply with the ten-day provision of the statute, cf. *Kersting v. Director of Revenue,* 792 S.W.2d 651 (App. E.D. 1990); *Owens v. Director of Revenue,* 865 S.W.2d 879 (App. E.D. 1993).

In all instances pertaining to the assessment of points and revocation or suspension of a driver's license, the court holds the statutes are mandatory directives that provide the Director with no discretion, cf. *Brown v. Director of Revenue, supra.*, at 400. However, directives to the court contained within the same statutes are interpreted as "directory" based on a lack of penalty for failure to comply with the statute. *Kersting, supra., Brown, supra.* "In determining whether a statute is mandatory or directory, the general rule is that

when a statute provides what results will follow a failure to comply with its terms, it is mandatory and must be obeyed; however, if it merely requires certain things to be done and nowhere prescribes results that follow, such a statute is merely directory . . . where a statutory provision does not provide what results shall follow a failure to comply with its terms, it is generally held to be directory." *Kersting, supra*.

In *State ex rel. McTague v. McClellan*, 532 S.W.2d 870, 871(Mo.App. 1976), the appellate court noted that this Court has explained the mandatory-directory dichotomy as ordinarily arising in the determination of "whether failure to comply with a statutory provision makes an act or proceeding void . . . (w)hen the statute creates an official duty in the interest of the public it is a different matter; and when the General Assembly imposes such a duty upon a public officer, he has no discretion as to whether or not it should be performed," citing *State ex rel. Taylor v. Wade*, 360 Mo. 895, 231 S.W.2d 179, 181-182 (en banc 1950) (emphasis added).

Under strict standards of drafting, the term "shall" imposes a duty or requirement of a party to act in accordance with the writing, Black's Law Dictionary, *supra.*, at 576. "Ministerial duties are those duties of a clerical nature which a public officer is required to perform upon a given state of facts, in a prescribed manner, in obedience to the mandate of legal authority, without regard to his own judgment or opinion concerning the propriety of the act to be performed," *Yelton v. Becker*, 248 S.W.2d 86, 89 (Mo.App. 1952), citing *State ex rel. North & South R. Co. v. Meier*, 143 Mo. 439, 45 S.W. 306. In *Brown v. Director of Revenue, supra.,* the court saw "no discretion on the part of the Director to do anything but

revoke privileges when the driver has accumulated 12 points in 12 months" because the Director's obligation under the statutes is "a ministerial act directed by the legislature." If the Director's actions are mandatory because they are "ministerial acts," arguably the same is true of the court's reporting requirements under the statute. The Eighth Circuit stated in *McLallen v. Henderson*, 492 F.2d 1298 (C.A.8 (Mo.) 1974), that "court functionaries such as clerks are not clothed in judicial immunity because their duties are ministerial, not discretionary in nature." (emphasis added).

A "directory requirement" as described by Black's Law Dictionary is "a minor statutory or contractual instruction that is desirable but **not absolutely necessary**, as opposed to a mandatory requirement." Black's Law Dictionary, *supra.*, at 191. The court's own holdings bear out the fact that the ten-day reporting period should be considered mandatory. Missouri courts have consistently recognized that the Director of Revenue is not omniscient and cannot act to assess points and revoke or suspend a license without first receiving notification from the court of a conviction. *Buttrick v. Director of Revenue*, 804 S.W.2d 19, 20 (Mo. banc. 1991). This points to the mandatory nature of the act required of the court to report the conviction within the ten-day period prescribed by the statute. Failure of the court to comply with reporting requirements frustrates legislative intent and casts the revocation or suspension in the light of a deterrent or retributive punishment rather than a remedial action. *Mayo, supra.* Had the legislature intended to leave it to the court to notify the director whenever they happened to get around to it, it would not have indicated a ten-day period. "The protection of the public and the declared public policy

requires public officials to comply with mandatory statutory provisions, and such requirements may not be avoided by a compliance only when the official sees fit to comply." *Fulton v. City of Lockwood*, 269 S.W.2d 1, 8 (Mo. 1954).

In construing a statute, it is appropriate to consider the statute's history, the surrounding circumstances, and the ends which the legislature seeks to accomplish, *Beal v. Industrial Commission*, 535 S.W.2d 450 (Mo.App. W.D. 1976). With regard to §302.225 the legislature amended the statute in 1982 and reduced the time for the court to advise the Director of Revenue of convictions from fifteen days to ten days. "When the legislature amends a statute, it is presumed to have some effect," *Baldwin v. Director of Revenue*, 38 S.W.3d 401, 405 (Mo. 2001), and such amendments can be considered in interpreting the meaning of the original statute. *State ef inf. Danforth v. David*, 517 S.W.2d 56 (Mo. 1974).

Clearly, the legislature recognized the importance of the court's notification to the Director, *Harding v. Director of Revenue*, 27 S.W.3d 823, 824 (Mo.App. W.D. 2000). "An amendment to a statute should never be construed in a manner which results in the mooting of the legislative changes, since the legislature is never presumed to have committed a useless act." *Id.* The legislature's overreaching purpose in enacting the license revocation statutes, is to immediately remove dangerous offenders from Missouri roadways, *Collins, supra*., and the legislature is presumed to have knowledge of the existing state of the law at the time of its enactment. "In considering what the legislature intended by its enactment, we are guided by the propositions that the General Assembly is presumed to be aware of

existing declarations of law and the construction of existing statutes when it enacts a law on the same subject." *Barnhart v. McNeill*, 775 S.W.2d 259 (Mo.App. W.D. 1989).

R.S.Mo. §302.302 providing that the Director "shall put into effect a point system" and that "points shall be assessed **only** after a conviction or forfeiture of collateral," is further evidence that the court's ten-day reporting requirement is more than directory, (emphasis added). The statutory provisions of 302.225 applicable to the court constitute a ministerial act requiring strict compliance before the Director can comply with provisions deemed mandatory in assessing points and revoking or suspending licensure.

As provided in Point I, the statutes must be read *in pari materia*; that is, they are to be construed together. Consequently, if the Director's obligations are mandatory but subject to notification of convictions by the court, then the obligation of the court to report within the prescribed ten-day must also be a mandatory requirement.

Mr. Harper does not deny that his intoxication resulted in the injury of five individuals, for which he was punished with criminal sanctions. He served a period of incarceration for the criminal charges and has been on probation since his release in October, 2000. At all times since his release from incarceration, Mr. Harper's vehicle has been equipped with an Ignition Lock Devise that controls the operation of his motor vehicle. He has performed all requirements imposed on him by the circuit court judge.

Statute required that the court notify the Director of Revenue of Mr. Harper's conviction on or about March 23, 2000, ten days after entry of the court's judgment of conviction. R.S.Mo. §302.225. The clerk, as an official of the courts, failed to perform

this task. The action of an angry citizen who recruited the aid of a local television news investigator brought the inaction of this public official into the limelight. The media attention forced compliance with the reporting requirement.

Appellant contends that the revocation of his driving privileges eleven months after his criminal conviction divorces the revocation from a remedial act. *Mayo, supra.* The eleven-month delay transforms the revocation into a retributive or deterrent punishment. *Id.* The revocation of Mr. Harper's license did not act to immediately remove him, a threat to the public safety, from the roadways. The delayed revocation merely appeases an angry citizen, satisfies public outcry, and punishes Mr. Harper a second time for his alcohol related offense.

This issue has been addressed on numerous occasions at every level of the Missouri court system, providing an abundance of precedent in opposition to Appellant's position in this case. However, that precedent is founded on an erroneous interpretation of legislative intent, justifying a new interpretation of the law overruling past precedent. As stated above, as public officials, the courts have no discretion in whether or not they are required to comply with the ten-day reporting provision. Neither is there any justifiable reason for the delay in reporting to the Director. There is nothing ambiguous about the wording of the statute. Based on nothing more than the "cardinal rule of statutory construction" requiring the court to ascertain the true intention of the legislature and to give reasonable interpretation in light of legislative objective, *Collins, supra.*, the reporting provisions of §302.225 require strict adherence, or risk subjecting defendants to double punishment.

CONCLUSION

In summary, the Director of Revenue has exceeded his express statutory authority in denying a license to Mr. Harper. Section 302.060(9) does not mandate such a result. Assuming that the form of §302.060(9) is ambiguous and has been construed by the Director in such a way as to deny Mr. Harper a license, that construction is unreasonable and against the weight of the inferences to be drawn from the statutory definition of "conviction," legislative history, and surrounding circumstances.

The interpretation applied to §302.060 and §302.225 by the Director of Revenue and the Missouri Courts constitute a violation of Appellant's equal protection rights under the Fourteenth Amendment to the United States Constitution, and impose punitive rather than remedial sanctions against Appellant. Consequently, both the ten-year denial and the one-year revocation of Appellant's driving privileges should be set aside and the Director of Revenue instructed to reinstate Appellant's license.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the foregoing brief complies with the limitations contained in Supreme Court Rule 84.06, and that this 40 page brief contains 8,645 words, or 752 lines.

The undersigned further certifies that the disk simultaneously filed with the hard copies of the brief has been scanned for viruses and is virus-free.

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